CASE NO. 99-019

IN THE SUPREME COURT OF THE STATE OF MONTANA

IN THE MATTER OF THE ESTATE OF
CHARLES LAUREN MILES, Decedent

(GARRY NORVAL MILES,
LAWRENCE MILES, RONALD
KAY MILES, AND KENNETH
LAUREN MILES, HEIRS TO THE
ESTATE OF CHARLES LAUREN MILES — Heirs/Appellants

MS. PATSY JOAN MILES — Personal Representative /Respondent)

APPELLANTS' BRIEF

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PERSONAL REPRESENTATIVE /RESPONDENT

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2. Did the District Court err, as a matter of law, by denying the children of the decedent standing, in ruling that children must be devisees in order to be interested persons under §72-1-103(25), MCA?

3. Should this Court, in exercising its authority over the bar, require that probate fees be charged on an hourly basis?

4. Did the District Court err, in a probate case regarding the reasonableness of fees, in denying discovery of the records of the personal representative and her attorneys?

5. Did the District Court err, as a matter of law, in refusing to sanction counsel for the personal representative for presenting a legal brief on the insurance issue that is not well grounded in fact and is unwarranted by existing law?

II. STATEMENT OF THE CASE

This case arises out of the contesting of personal representative and attorney fees by the heirs of Charles Lauren Miles, who died on June 10, 1997. Under Article II of said will, all debts and expenses of the estate are to be paid from insurance proceeds receivable by the estate. Under Article V of said will, 50% of

the balance of insurance proceeds are to be distributed to the decedent's four surviving heirs. [Appendix 1 to the Application for Writ; hereinafter "Appl."]

On November 17, 1998, the District Court ruled that an annuity contract payable to the estate was not insurance under Montana law. The District Court also ruled that since the children of the decedent were not devisees, they lacked standing to challenge attorney fees since they could not be "interested persons" under §72-1-103(25), MCA. [1 1/17/98 Order, p. 5]

Prior to this ruling, the heirs had challenged personal representative and attorney fees charged to the estate and sought discovery. [Motion for Settlement of Fees, 9/2/98] In an order dated October 30, 1998, the District Court barred discovery of the records of the estate, the records of the personal representative and her attorneys, oral and written communications with testimonial experts, prior inheritance tax returns filed by the personal representative's attorneys for the last five years, records pertaining to the absence of the sole owner of the firm handling the estate, and the academic record of the associate handling the estate (who had been recently admitted to the bar at the beginning of this probate). The District Court imposed sanctions for seeking said records; however, no sanctions have been assessed since the District Court dismissed the case and appear moot. [1 1/17/98 Order]

The heirs immediately filed with this Court an Application for Writ of Supervisory Control regarding the District Court's barring of discovery and imposition of sanctions. On November 10, 1998, this Court ordered the District Court to file a brief on this matter by November 20, 1998. Instead, on November 17, 1998, the District Court filed the Order noted above, and this Court ruled the matter moot.

The heirs now appeal the District Court's Orders of October 30, 1998, and November 17, 1998.

III. STATEMENT OF FACTS

Charles Lauren Miles died suddenly on June 10, 1997. The will of the decedent, drafted in 1982, is unusual in providing that all of his property passes to his then recent ex-spouse, Patsy Joan Miles, who also is nominated as personal representative. (This- extraordinary disposition was actually increased by the death of the decedent's father in 1996.) For the past fifteen years the decedent had been living with another woman, whom is unprovided for in the probated will, and on at least one occasion the decedent told an heir, Lawrence Miles, that it was the decedent's intention to execute a new will. The decedent's ex-wife is a long time employee of the bank at which the decedent had his safety deposit box.

Under Article V of said will there is a specific bequest that states that "50% of any insurance proceeds payable upon" death, after legitimate estate expenses, passes to the decedent's four surviving heirs. [Appendix 1, Appl.] Said proceeds are $52,167.91. [Appendix 5, Appl.] Hence, the probate fees directly reduce the heirs' share of this estate, which is $26,083.95.

Shortly after the decedent's death, Ms. Miles retained the Law Offices of Fred Paoli, Jr., P.C., to probate the estate. At the time of these events, this law office, a professional corporation, was unusual, as it consisted of only one principal, Fred Paoli, Jr., and only one associate, Kevin S. Brown. Further, according to the firm Bogue, Koury & Marylander, LLC, in Denver, of which Mr. Paoli is of counsel, Mr. Paoli had abandoned the practice of law and was then coaching rugby at Harvard University, in Cambridge, Massachusetts. [See Appendix 3, Appl.] Mr. Brown is, according to the state bar, just two years out of law school (nine months when the firm took this probate). [*Id.,* Item 3] It appears then that Mr. Brown, an associate, was left to run the Fred Paoli "firm" in the absence of Mr. Paoli; that Mr., Paoli was not reviewing the work of his associate, as required by Rule 5 of the Rules of Professional Conduct; and that Mr. Brown,

in violation of Rule 7 of the Rules of Professional Conduct, was representing himself as the Fred Paoli, Jr., Firm.'

A search of the probate files of Park County reveals that this is Mr. Brown's first probate in Park County, and may be his first probate ever. [Id., Item 4] In the absence of Mr. Paoli, the Fred Paoli firm retained the services of Karl Knuchel (who is not a member of the Paoli "firm") to assist Mr. Brown in this probate. Based upon the affidavits of Mr. Brown and Mr. Knuchel, no less than 25% of Mr. Brown's time has been spent reporting to Mr. Knuchel and all of Mr. Knuchel's time has been spent receiving Mr. Brown's reports. [Appendix 4, Appl.] All of this duplicative time has been charged to the estate, and will be paid from the insurance proceeds that would otherwise go to the heirs under the Will.

On May 18, 1998, the inheritance tax return of the estate was filed. [Appendix 5, Appl.] On the Application of Determination of Inheritance Tax, Page 2, lines 6 and 7, (Hereinafter, the INH-2), the fee for the personal representative of the estate is exactly 2% of the "Montana Estate Subject to Tax": i.e., .02 x $542,380; and, as shown on the Application of Determination of Inheritance Tax, page 2, the attorney fees are exactly 1.5 times the fees for the personal representative. In fact, the INH-2 indicates that this number was calculated after the

[1] After this appeal commenced, an attempt to "cure" this problem was made by naming Mr. Brown as an owner of the "firm." Per the title page of the personal representative's Response to Petitioner's Application for Writ, as of November 19, 1998, this change had not yet occurred.

fee number for the personal representative was calculated, and was simply pasted onto said form. [*Id.*]

At a hearing on a separate matter, on September 2, 1998, the estate's accountant, Douglas A. Holm, C.P.A., testified that the personal representative fee on the INH-2, $10,800, had been provided to him by opposing counsel. [9/2/98 Tr., p. 13] He also stated that the attorney fees "was calculated based on the formula given to me by the attorney . . . It's a formula that is set down in the state code." [9/2/98 Tr., pp. 13-14] He also affirmed that opposing counsel provided no billing records or any records at all as to how the legal fee was calculated. [9/2/98 Tr. p. 15]

Opposing counsel has denied that he is charging the maximum fee permitted by statute. [Response to Motion for Settlement of Fees, pp. l-2 (9/17/98); Appendix 4, Appl. (hereinafter "Response to Motion"] Said counsel has also argued that the maximum fee is, per se, a "reasonable fee" and has denied that this Court's opinion of *In re* Estate *of Stone* is "legally applicable" to this case. [*Id.*] In light of these statements, and the contrary testimony of their own accountant, both proffered and in the record, discovery was sought as to how other probates by these counsel were charged attorney fees and personal representative fees

(specifically, prior inheritance tax returns). The District Court barred discovery of said returns.

The affidavits submitted by the personal representative and her attorneys to the District Court may be found at Appendix 4 of the Application for Writ, with Supplemental Affidavits filed by the personal representative and her attorneys on November 11, 1998. [Response to Application, Ex. D] As regards the affidavits of the personal representative's attorneys, the hourly rate actually being charged by either attorney is not stated. Nor, in Mr. Brown's affidavit, is there any detailing of his skill or experience. Further, as indicated by the affidavits of the personal representative and her attorneys, there appear to be no time logs or bills for the personal representative or her attorneys. Finally, duplicative fees are being charged by Karl Knuchel, his co-counsel for the time spent by Mr. Brown for reporting to him. [2] *(See Oliver v. City of Larimore, 540* N.W.2d 630 (N.D., 1995); and *In re Sloan's Estate,* 538 N.W.2d 47 (Mich.App., 1995).)

Opposing counsel has consistently stated that the estate is near to closure and that- only the challenges of the heirs prevents the closing of this estate. Taking that statement as true, as of May 18, 1998, the total hours listed for Mr.

[2] Until September 22, 1998, the time billed by Mr. Knuchel for dealing with Mr. Brown on this case matched, hour for hour. After this duplicative time was pointed out in the Application, the Supplemental Affidavit of Mr. Brown and that of Mr. Knuchel, dated November 11, 1998, covering the period from September 22, 1998 to November 11, 1998, cease to tract hour by hour. See Exhibit D in their Response to Petitioners' Application for Writ.

Knuchel in his affidavit were 13.75 hours. The total hours claimed by Mr. Brown as of that date were 43.6 hours. Together these total 57.35 hours. The legal fees for said hours on the Inheritance Tax Return were $16,200. Not deducting for duplicative time, this translates to a hourly billing rate of $282.47 per hour. Adjusting for amounts paid to Mr. Holm, the estate's accountant, $1,767.50, the fee of $15,032.50 still comes out as an astonishing $262.12 per hour. [Movants' Reply Brief, p. 10; September 24,1998]

Mr. Holm was also prepared to testify at the October 27, 1998, hearing that he was instructed to increase the attorney fees beyond the statutory maximum for a separate return. Opposing counsel failed to inform the District Court of this extraordinary fee in its September 17, 1998 Response to Motion for Settlement of Fees. [10/28/98 Tr., p. 9; Response to Application for Writ, Exhibit B] The District Court barred this testimony.

To establish the reasonableness of the services provided to the estate, the cost of which will be borne ultimately by the heirs, the estate records of the personal representative and her attorneys were sought. The District Court barred discovery of said records on the grounds that they were privileged, despite the fact that they were used to prepare the affidavits submitted in this case. The District

Court also barred the discovery of estate records from any third party. [10/27/98 Order]

On or about May 18, 1998, counsel for the heirs, in reviewing the inheritance tax return of the estate, noticed that $52,167.91 was listed on said return as taxable annuity proceeds instead of non-taxable insurance. After exchanging correspondence with counsel for the personal representative, which included reference to the controlling case of *In re Fligman's Estate,* 113 Mont. 505 (1942), where this Court held that annuities were insurance under Montana Law, and applicable Department of Revenue Regulations, the heirs sought relief on this matter in the District Court. [Petition for Accounting, 8/4/98]

A hearing was held in the District Court on the annuity issue on September 2, 1998. In complete derogation of the rights of the heirs to receive legal authority in a timely manner as required by Rule 2 of the Uniform District Court Rules (the heirs' Petition and Brief was filed on August 4, 1998; the hearing was held 28 days later, a full two weeks after its due date), counsel for the personal representative filed a "'Hearing Brief' two minutes before the hearing that took the legal position that annuities were not insurance since they were exempted from the Montana Insurance Code. [Hearing Brief, p. 3, 9/2/98] Said position is directly contrary to existing law,

As demonstrated in the Petitioners' Reply Brief (pp. 21-24; 9/8/98) and Reply to Response to Motion for Sanctions (9/25/98) (summarized at pages 47-50, below), counsel for the personal representative knowingly misrepresented, in violation of Rule 3.3 of the Rules of Professional Conduct and Rule 11 of the Rules of Civil Procedure, particular provisions of the Montana Insurance Code (Title 33) for the purpose of misleading the District Court. Even in their Response to Motions for Sanction (9/23/98), counsel for the personal representative do not deny their specific deeds of misconduct.

Further, upon review of the correspondence file, counsel for the heirs discovered at least one occasion when the counsel for the personal representative, in violation of Rule 4 of the Rules of Professional Conduct, intentionally misrepresented fact to the counsel for the heirs, for the purpose of discouraging said counsel from asserting his client's rights. [Movants' Reply Brief Regarding Settlement of Fees, pp. 15-18 (9/24/98)]

IV. SUMMARY OF ARGUMENT

A. Annuity Contracts are Insurance

The District Court erred, as a matter of law, in ruling that annuity contracts are not insurance under the law of Montana. In so ruling, it ignored no less than three controlling precedents, *viz.*, In *re Fligman's Estate,* 113 Mont. 505 (1942);

Hammerstrom, 133 Mont. 469 (1958). All held that annuities were insurance under Montana insurance law. As the Coleman Court stated: "Estates and property have been planned and settled on the basis of the decision in the *Fligman* case, and if necessary to this decision, this court would treat that opinion as *stare decisis." 3* 17 P.2d, at 883.

Further, the annuity contract at issue is clearly an insurance contract under §33-1-201, MCA. Therefore, the annuity proceeds paid at the death of Charles Lauren Miles, are, under Article V of the Will, "insurance proceeds proceeds payable upon" death, and, after legitimate estate expenses, 50% passes to the decedent's four surviving children.

Finally, since the personal representative has, by amending the Inheritance Tax Return in the case in order to receive a $16,693.73 refund, represented to the Department of Revenue that she accepts this Court's position that annuity contracts are insurance under Montana law, she is estopped from claiming to the contrary under the maxim that when the reason is the same, the rule should be the same.

B. Standing - Children need not be devisees to be "interested persons"

Even should this Court find that annuity contracts are not insurance, the District Court erred in ruling that the children of the decedent must be devisees in order to have standing as interested parties under the Uniform Probate Code. Said decision, by converting the phrase "having a property right in or claim against . . . the estate" into an operative provision, violates the most basic rule of statutory construction that no part of a statute is superfluous, but must be read as a whole. *Gaub v. Milbank Ins.* Co., 220 Mont. 424,715 P.2d 94 (1987) There simply is no authority in any other Uniform Probate Code jurisdiction for the District Court's interpretation.

C.The Statutory Fee

As evidenced in this case, the persistence of the 3% fee is to the detriment of estates, the public, and the reputation of the bar. It is difficult to consider a more disadvantaged consumer than a personal representative handling his or her first probate. For many consumers this may be their first, and only, major interaction with the legal system.

The solution to the abuse of the 3% fee is for this Court to explain that its statement in *Stone* that "a reasonable fee should be ascertained by considering the time spent, the nature of the service, and the skill and experience required" means

a reasonable hourly rate. Requiring an hourly rate will bring certainty to this area of confusion. Only an hourly rate will protect estates, the public, and the reputation of the bar.

D. Rule 26 of the Rules of Civil Procedure applies to Probate Fee Cases

Because of the attempt by the District Court, in its 1 1/17/98 Order, to remove the interlocutory appeal from this Court's jurisdiction, by its ruling on the annuity issue and standing, this Court is presented with an unusual procedural context. Once this Court reverses the District Court's Order on the annuity issue, or on standing, the discovery issues once again come to the fore. Therefore, it would be appropriate for this Court to consider said issues now, as opposed to having the heirs file a second Application for Writ.

Rule 26(b)(1) applies to probate proceedings, including proceedings on the reasonableness of attorney fees. Therefore, there is no authority under Rule 26 for the District Court to permit the defending parties whose fees and credibility are at issue to control what will be discoverable and admissible at trial. Further, under the Uniform Probate Code, heirs are entitled to information regarding the estate, including estate records. In addition, in the case at bar, by submitting affidavits without asserting any privileges, said affiants have waived both attorney-client and work product privilege. In addition, at least three other

Uniform probate Code jurisdictions have permitted the discovery of attorney and estate records in probate fee cases.

Since opposing counsel has made inconsistent statements, as well as statements contradicted by the testimony of the estate accountant, as to how they calculate and charge probate fees, prior inheritance tax returns of said attorneys as well as any disciplinary complains pertaining to probates are relevant and calculated to lead to admissible evidence. Confidentiality concerns regarding such records can be addressed by the procedures outlined by this Court in *Human Rights Division v. City of Billings,* 199 Mont. 434; 649 P.2d 1283 (1982).

E. Sanctions should be imposed due to the "Hearing Brief."

Finally, the District Court erred, as a matter of law, by not sanctioning opposing counsel for misrepresentations of law contained in said counsel's "Hearing Brief', dated September 2, 1998, particularly since the District Court, in its 1 1/17/98 Order made findings of law that confirm the fact that opposing counsel made such misrepresentations.

V. ARGUMENT

A. The District Court erred, as a matter of law, in ruling that annuity contracts are not insurance under Montana law, since this Court's prior decision, *In re Fligman's Estate,* is controlling authority and *stare decisis* on this issue.

1. *The* Supreme *Court,* in *In re Fligman's Estate,* which is controlling authority under *stare decisis,* has ruled that annuity contracts are insurance; and that the phrase "insurance proceeds payable at the death of any person" encompasses the proceeds from an annuity contract.

Unfortunately, Mr. Miles is not here to tell us whether he understood that the annuity contract death benefit was subject to Article V. We do know that he purchased an annuity contract, issued by a *life insurance company,* and sold to him by a life *insurance agent.* In fact, the signature page to the contract that Mr. Miles signed indicates that the contract was being issued by the *ITT Hartford Life and Annuity Insurance Company.* So, apparently, the issuer of this contract, the "insurer", represented to Mr. Miles that it was in the *annuity* insurance business. [Petitioners' Supplemental Authority, 9/2/98; hereafter "Contract (Sup. Auth.)"]

However, there is no need for this Court to consider par01 evidence. As the District Court stated "The Court cannot look into the mind of the deceased, but must stay within the four comers of the annuity contract and Montana Law." (1 1/17/98 Order, p. 4)

Looking at Montana Law, the meaning of the phrase "any insurance proceeds" can be settled by looking at established precedent and statute. (See *In re Estate of Hill,* 281 Mont. 142, 931 P.2d 1320, at 1324)[3] This Court ruled in 1942, in *In re Fligman's Estate,* 113 Mont. 505 (1942), and confirmed in 1958, in *State v. Hammerstrom,* 133 Mont. 469 (1958), that the phrase "insurance proceeds payable at the death of any person" encompasses the proceeds from an annuity contract. Additionally, under §33-1-201, MCA, the annuity contract at issue is

[3] Refusing to apply parol evidence as to whether property was joint property, since the legal definition was controlled by statute. (*Id.*)

clearly an insurance contract. (See page 19, below) Thus, since there is controlling precedent and statutory definitions of the term at issue, there is no need to speculate as to the Testator's intent.

Further, *In re Fligman's Estate* is *stare decisis,* and is controlling authority. *Stare decisis* means "to abide by, or adhere to, decided cases." Black's Law Dictionary 1406 (6th ed. 1990). It is of fundamental and central importance to the rule of law. *(Patterson v. McLean Credit Union* (1989), 491 U.S. 164, 172, 109 S. Ct. 2363, 2370, 105 L. Ed. 2d 132, 147 (citation omitted)) Indeed, there is no question but that "very weighty considerations underlie the principle that courts should not lightly overrule past decisions." (*Moragne v. States Marine Lines* (1970), 398 U.S. 375, 403, 90 S. Ct. 1772, 1789, 26 L. Ed. 2d 339, 358) This Court has held, in this regard, that "stare decisis is a fundamental doctrine which reflects our concerns for stability, predictability and equal treatment. . . ." *(Formicove, Inc. v. Burlington Northern,* Inc. (1983), 207 Mont. 189, 194, 673 P.2d 469,472.) Controlling authority may be only overturned if manifestly wrong. (*Id.*)

As stated by this *Court* in *Fligman*: "The ***sole*** question presented for our determination is as to whether or not these annuity contracts are insurance." 113 Mont. 505, at 506 (1942; emphasis supplied). In determining that an annuity contract is insurance this Court considered four statutory provisions that pertained to annuities and insurance companies. This Court determined that (1) insurance companies had the authority to issue both annuity and life insurance policies (133 Mont., at 507); (2) that annuity contracts were subject to the same statutory regulations *(Id.);* (3) that said premiums from both were taxable by the state (113 Mont., at pp. 507-508); and (4) that annuities were specifically excluded as being investments by statute (113 Mont., at 508).

The first two bases for this Court's decision that annuity contracts are insurance under Montana law can be dealt with briefly: annuities are even more entrenched as insurance today than they were in 1942. In summary: (1) only life

insurance companies licensed in Montana may issue annuity contracts (§33-2-108, MCA); (2) only licensed life insurance producers may distribute annuity contracts (§33-17-201, 33-17-103(9), and §33-17-103, MCA); (3) said annuity contracts must comply with the form specified by the Insurance Code (933-l-501, MCA); (4) said insurance companies must account for annuity contracts in calculating their assets and liabilities (§33-2-501, and §33-2-511, MCA); (5) said life insurance companies must calculate, and deposit reserves with the Commissioner of Insurance, reserves based on their annuity contracts (§33-2-52 1, MCA); (6) life insurance companies that issue annuity contracts must diversify their investments (§33-2-806, MCA); and, finally, (7) annuity contracts are classified as insurance under the "Montana Life and Health Insurance Guaranty Act." (§33-10-201, *et seq.*)

Today, as in 1942, annuities are not investments -- this Court's fourth point. In fact, as the *Fligman* Court noted, they were specifically excluded from the "Regulation of Stock Brokers and Investment Companies". The same rule applies today, in virtually the same language. As the statute stated then:

> The provisions of this Act shall not apply to the following securities: ... 4. Policies contracts of insurance licensed to do business ˙m this state.
>
> 113 Mont., at 508.

The current provision of the Code states:

> §30-8-113(2) An "investment company security" is a security. "Investment company security" means a share or similar equity interest issued by an entity that is registered as an investment company under the federal investment company laws, an interest in a unit investment trust that is so registered, or a face-amount certificate issued by a face-amount certificate company that is so registered. **Investment company security does not include an insurance policy or endowment policy or annuity contract issued by an insurance company.**

(emphasis supplied)

In short, this basis of the *In re Fligman's Estate* remains unchanged.

So, under the Insurance Code, the law determines who can sell annuities, what the contracts can say, that reserves must be set aside, and that there has to be diversification of investments. No mutual fund, for example, which are investments, has to comply with any of these requirements.

Unlike *Fligman*, annuity considerations are no longer included as premiums in calculating the license fee tax, the Court's third point. §33-2-705(1), MCA. We freely admit that that provision has changed. However, in contrast, in assessing fees under the "Montana Life and Health Insurance Guaranty Act", annuity considerations are now counted as premiums. (See §33-10-202(8), §33-10-116, and §33-10-117, MCA)

When the Supreme Court revisited *Fligman,* in 1958, in *State v. Hammerstrom,* and came to the same conclusion, they noted:

> Eight legislative sessions have been held since the decision, and the legislature has not seen tit to amend the statute. Estates and property have been planned and settled on the basis of the decision in the Fligman case, and if necessary to this decision, this court would treat that opinion as *stare decisis.*
>
> 113 Mont., at 471 (Citation omitted)

Now twenty-eight legislative sessions have passed since *In re Fligman's Estate,* and the legislature still has not disavowed it. In fact, in the last session when they reviewed this provision, *they increased the* amount that could pass through annuity contracts under the inheritance tax. See Amd. Sec. 1, Ch. 253, L. 1997 As the Court is aware, where a section of a statute is amended, the portions thereof which are not altered are to be considered as having been the law from the time they were enacted (*Blackford v. Judith Basin* County, 109 Mont. 578, 98 P.2d 872 (1940)), and repeal by implication is disfavored unless subsequent provisions are plainly and irreconcilably repugnant to each other. *W.R. Grace & Co. v.*

Department of *Revenue,* 238 Mont. 439, 779 P.2d 470 (1989) Since the amendments to the Insurance Code regarding annuity contracts are not clearly in conflict with their predecessor provisions, together with their treatment under the Inheritance Tax (ARM. §42.35.244), these provisions should be interpreted consistently with prior law.

Finally, as stated by the estate's accountant, the personal representative' has applied to the Department of Revenue for a tax refund based upon *Fligman*. [9/2/98 Tr., p. 16] Since the estate, according to the INH-2, is greater than $100,000,[4] and the personal representative, the principle devisee, is a stranger in blood, the applicable tax rate is 32%. §72-16-321(4), §72-16-322(3). Applying that tax rate to the $52,167.91 in annuity proceeds previously taxed results in a refund of approximately $16,693.73. Therefore, in return for $16,693.73 the personal representative is quite willing to accept the rationale of *Fligman* that annuities are insurance, but then refuse to distribute those same insurance proceeds as required by the will. She should be estopped from doing so, as it is a maxim of Montana jurisprudence that "when the reason is the same, the rule should be the same." §1-3-201, MCA.

2. Under section 33-I-201, MCA of the Insurance Code (833-l-101, MCA. *et* seq.) the annuity contract at issue is an insurance contract and. therefore, the death benefit paid upon the death of the Testator are "insurance proceeds payable upon my death."

Absent from the District Court's Order is the definition of what constitutes an insurance contract. "Insurance", under the Insurance Code (§33-1-101, MCA. et *seq.),* is defined as:

[4] Appendix 5, p.3, Appl.

> a contract whereby one undertakes to indemnify another or to pay or provide a specified or determinable amount or benefit upon determinable contingencies
>
> 533-l-201, MCA.

Regarding the annuity contract at issue:

1. It is a contract whereby **ITT Hartford Life And Annuity Insurance Company**

undertook to

2. Pay or provide **a specified or determinable amount**

3. upon the **determinable contingency of Mr. Miles' death.**

[Contract (Sup. Auth.), Amendatory Rider, pp. 2-3(9/2/98)]

Thus, under the Insurance Code this annuity is an insurance contract; and as an insurance contract, the death benefits paid thereunder are the proceeds of an insurance contract. Therefore, one half of all such proceeds, after a determination of the estate's legitimate debts and expenses, should be devised to the Decedent's four children in accordance with his will.

Article V of Mr. Miles' Will refers not to life insurance, but to **"any** insurance proceeds payable upon my death..." (emphasis supplied). [Appendix 1, p.2, Appl.] Since annuity contracts are insurance contracts, any proceeds from the death benefit ***are*** "insurance proceeds payable" upon Mr. Miles' death.

Therefore, the District Court's emphasis on whether the annuity contract at issue is life insurance is misplaced. [1 1/17/98 Order, p. 3] However, even if it were not misplaced, there is sufficient statutory authority for the proposition that annuity contracts are a form of life insurance.

Let us begin by reviewing the statute at issue:

> §33-1-208. Life insurance. Life insurance, including credit life insurance, is insurance on human lives. The transaction of life insurance includes the granting of endowment benefits, additional benefits in event of death or dismemberment by

> accident or accidental means, additional benefits in event of the insured's disability, benefits that provide reimbursement or payment for long-term home health care or long-term care in a nursing home or other related institution, and optional modes of settlement of proceeds of life insurance. Transaction of life insurance does not include workers' compensation insurance.

The District Court stated that life insurance "is generally a financial hedge against dying too soon" while an annuities "are generally used by investors to accumulate money for retirement." [1 1/17/98 Order, p. 3] However, long-term nursing home insurance, which is clearly defined as life insurance but, like an annuity contract, provides funds for retirement. So there are life insurance contracts that provide a lifetime benefit.

Further, §33-1-208, MCA, by its very terms is not exclusive. Life insurance ***includes*** as insurance on human lives certain kinds of insurance, including certain insurance that provides a benefit during life, including endowment benefits.' The only type of insurance that confers a current lifetime benefit that is excluded from the definition of life insurance is "workers' compensation insurance." Therefore, the definition of life insurance under §33-1-208, MCA, does not exclude annuity contracts.

This conclusion is consistent with the Insurance Code provision that definitions of types of insurance are not mutually exclusive, specifically:

> 833-l-205. Definitions of kinds of insurance not mutually exclusive. It is intended that certain insurance coverages may come within the definitions of two or more kinds of insurance as defined in this part, and the inclusion of such coverage within one definition shall not exclude it as to any other kind of insurance within the definition of which such coverage may likewise be reasonably included.

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[5] Just what lifetime benefit had Mr. Miles contracted under this contract? Once he turned ninety years old, he would have received, under the contract, an annuity on the 15th day of every month until his death. [Contract (Sup. Auth.) p. 4, 12 (9/8/98)]

As regards the contract at issue, as in *Fligman,* the Decedent had several settlement options, including naming a contingent beneficiary and a contingent annuitant, not just simply to take the contract price at death. [Contract (Sup. Auth.), p. 4 (9/2/98)] Can choosing between settlement options make this contract an investment in one case and life insurance in another? Of course not.

The lack of analysis applied by the District Court can be judged by this comment: "Life insurance, on the other hand, is generally a financial hedge against dying too soon and is used to protect family members or others." (1 1/1 7/98 Order, P. 3) This Court recognized in *Fligham,* as does 33-l-208, MCA, that life insurance contracts may have "optional modes of settlement of the proceeds of life insurance." As the court noted:

> It is not unusual, moreover, to have, to have any balance due at the death of the insured payable to a beneficiary and the distinction between such policies [endowment life insurance] and a specific annuity contract is not broad enough to classify one as insurance and place the other under a different category so far as our revenue laws are concerned. Furthermore, if the insured dies during the twenty years, the entire sum [from the endowment life policy] is payable to the beneficiary as life insurance...**so far as the beneficiary is concerned, whatever she receives from the life insurance company under either policy is life insurance on the insured's life...**
>
> 113 Mont. at pp. 509-5 10. (emphasis supplied)

In the case at bar, as far as recipients, the children of Mr. Miles, are concerned whatever they "receive from the life insurance company under either [an endowment life policy or an annuity policy] is life insurance on the insured's life..." Or, to quote the District Court, "is used to protect family members or others."

In consideration of these provisions, as well as the fact that only life insurance companies may issue annuity contracts, that only insurance producers licensed to vend life insurance may sell annuity contracts, and that the life

insurance provisions of the Insurance Code apply to annuity contracts (See pages 16- 17, above), annuity contracts are a form of life insurance.

It is equally clear that annuity contracts are not an "investment" as defined by law, since annuity contracts are specifically excluded from the definition of an investment under §30-8-113(2) -- a position unchanged since at least 1942. (See pages 17-l 8, above)

The position of the District Court on this matter is quite simplistic: If an annuity grows by investing, it must be an investment. [1 1/17/98 Order, p. 3] Apparently, the District Court has never heard of whole life or variable life policies. Further, this counsel is unaware of any other "investment" governed by the Insurance Code and guaranteed, and/or regulated by the Commissioner of Insurance. (See pages 16- 17 above).

B. The District Court erred, as a matter of law, by denying the children of the decedent standing, in ruling that children must be devisees in order to be interested persons under §72-1-103(25), MCA.

A basic rule of statutory construction is that no part of a statute is superfluous, but must be read as a whole. *Gaub v. Milbank Ins.* Co., 220 Mont. 424, 715 P.2d 94 (1987) The District Court's interpretation of who is an "interested person" under §72-1-103(25) MCA of the Uniform Probate Code failed to apply this basic rule. The District Court held as follows:

> Section 72- 1 - 103(25) M.C.A. defines "Interested Persons" to include any "heirs, devisees, children, spouses, . . . having a property right in or claim against...the estate of the decedent." The children of Mr. Miles, no longer having any property right in or claim against the estate are no longer "interested persons" under Montana Law, and therefore have no standing to challenge the probate of the will.

In point of fact, the statute provides in its totality as follows:

> (25) "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, *and* any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. The term also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding.
>
> §72-1-103(25) (emphasis supplied)

The position of the District Court, then, is that an heir must also be a devisee to be an interested person. The basis of that decision is the theory that the phrase "having a property right in or claim against...the estate of the decedent" is the operative provision of the statute. Taking the District Court's rendering to its logical conclusion, then the statute should be written as follows:

> (25) "Interested person" includes any persons having a property right in or claim against the estate of the decedent.

One wonders why the legislature choose all that clutter about children and spouses. Totally unnecessary, according to the District Court. Let us apply the Swandel Code to the following fact situation:

> Decedent disinherits his son. Since he is not a devisee, under the Swandel Code he has no property interest and, hence, is not an interested person. In fact, he is not even entitled, as "interested persons" are, to apply for formal probate under §72-3-105, MCA, or to demand notices of filings or orders. §72-3-106, MCA.

This example demonstrates how potentially pernicious the District **Court's** interpretation of the statute is. There is no authority in the any other Uniform Probate Code jurisdiction for this interpretation. Interpreting the whole statute, results in children always being "interested persons". The interest of a child in his father's estate is more than simply in its property. Therefore, the decision of the District Court on the lack of standing of the children of the Decedent should be reversed.

C. This Court, in exercising its authority over the bar, should require that probate fees be charged on an hourly basis.

As this Court is aware, due to abuses of probate fees in Butte, the legislature imposed statutory limits on personal representative and attorney fees.[6] Under §72-3-63 1, in most cases a personal representative's fees cannot exceed 2% of the value of the estate reported for estate tax purposes; and attorney fees, in all cases, cannot exceed 1.5 times personal representative's fee. §72-3-633(1), MCA. Should either a personal representative's fee, or an attorney's fee, exceed the statutory limit an application must be made to the District Court for the approval of the fee. Further, interested persons have the right to challenge any fee, and the burden is then on the personal representative and attorney to establish the reasonableness of their fees. §72-3-634, MCA.

[6] See the Chapter's Compiler's Comment, Chapter 1, pp. 5-6.

1.5 times the maximum personal representative fee is 3%. There is a common perception among the public, and some members of the bar, including the District Court in this very case,[7] that attorneys are entitled to a 3% fee for probate regardless of the particular effort required for the estate. Both the statutory provision, and a prior decision of this Court in favor of the *"3%* fee" *(Matter of Magelssen 's Estate,* 182 Mont. 372, 597 P.2d 90 (1979)), perhaps continues to contribute to this confusion.

In the meantime, this Court has taken some steps to establish that there is no *3%* fee. Specifically, this Court set a standard for personal representative and attorney fees in *In re Estate of Stone, 769* P.2d 334 (1989). The Court then further established that the "3% fee" is no guide as to the reasonableness of the attorney fee in *In re Benson,* 243 Mont. 17, 792 P.2d 1119 (1990). Finally, this Court, in recognition that an estate is a separate legal entity, established that the fees of a personal representative or attorney must be calculated to benefit the estate and not be for the personal benefit of the fee charging party or their interest (such as exercising a bad faith defense). *Flikkema v. Kimm,* 255 Mont. 34; 839 P.2d 1293 (1992).

[7] As the District Court stated: "This was calculated by a percentage, which the statute allows." (9/2/98, Tr. p. 23, ln. 13-14).

As indicated by the testimony of the accountant in this case, the INH-2 filed for this estate, and the comments of the District Court referred to above, the "3% fee" is still being practiced by some members of the bar. This can be confirmed by an examination of the affidavits submitted in this case. Opposing counsel has consistently claimed that only the challenges of the heirs to their actions have prevented closing of this estate. Taking that statement as true, based on the affidavits submitted in this case, we can only identify 3.05 hours since May 18, 1998, devoted to estate matters unrelated to this litigation.* [Movants' Reply Brief, pp. 14 -15 (9/24/98)] Therefore, as of May 18, 1998, before the heirs started raising concerns about the administration of this estate, the plan was to close the estate based on approximately 57.35 hours. Let us assume that they need to expend ten additional hour to close the estate. (Professor Eck has compiled statistics that the average hours for an entire probate is ten to twenty-nine hours.)' That puts them at 67.35 hours. We will even given them additional credit for the 3.05 hours already identified as estate related. That totals 70.8 hours. With a fee of $15,032.50, even these grossed-up numbers, for an estate that is purportedly ready to close, translate to a billing rate of $212 per hour. [*Id.*]

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[8] The hours expended concern a Draft Contract for Deed (1.75 hours; 6/1 9/98); social security numbers (.1 hours; 6/2/98); and asset transfers on 6/5/98 .25, 6/1 1/98 .05, 6/12/98 .05, 6/17/98 .3, .25, and 6/22/98 .3) [Appendix 4, Appl.]

[9] See "The Uses and Abuses of Living Trusts" in the Montana Legal Guide to Long Term Care Planning, Montana Office of Aging, p. 42

Obviously, as illustrated by the facts of this case, the message of Stone, *Benson*, and *Flikkema* has fallen on deaf ears, to the detriment of estates, the public, and the reputation of the bar.

It is difficult to consider a more disadvantaged legal consumer than a personal representative handling his or her first probate. For many consumers this may be their first, and only, major interaction with the legal system. We have a monopoly on the forms and know the process." If we are going to be given this monopoly, this Court has a responsibility to see that the bar uses it responsibly. After all, the purpose of the Uniform Probate Code, and "informal" probate, is to permit the efficient probate of estates in a manner that still protects the rights of all interested persons, not to guarantee some members of the legal profession 3% of each estate they probate.

Mentioning this theory to other members of the bar has elicited some interesting responses. Many recognize that there is no 3% fee, and simply inform their clients that it is a cap, and charge their time on an hourly basis. This appears to be the majority. Others state that by charging the 3% fee for an average or large estate they make up what they lose on small probates that they would not handle otherwise. While this may, or may not, be good social policy, this "tax" certainly

[10] Several years ago, the Clerk of the Gallatin County District Court was threatened by the State Bar for handing out probate forms to the public, which were considered proprietary. The practice was stopped immediately.

has not been authorized by the legislature or this Court. Some state that their clients, concerned about hourly billing, like the certainty of the 3% fee (even though they are protected by the requirement that the District Court approve fees in excess of 3%). The rest, like opposing counsel, remain silent and charge the *3%* fee.

Unlike the opposing counsel in this case, this attorney did not charge a premium for learning how to do probate. (In fact, he discounted his hourly rate for "learning curve" on his first probate.) According to Professor Eck, it is clear that in the majority of cases, probate should take 10 to 29 hours of legal and accounting work. Therefore, the conclusion drawn by Professor Eck is that probate is a very predictable area of practice. (See "Abuses", *supra*, fn. *9)* Even in this purportedly "complex" estate, if we granted that the hours charged by May 18, 1998, including duplicative hours by having two counsels, were reasonable, 57.5 hours at $125 per hours translates to $7,187.50 (or only 1.3% of the estate), or less than half of what they originally tried to charge.

The corollary to these conclusions is that the cost of doing probate, on an hourly basis, is very predictable in the majority of cases and, for the average probate, should be far less than 3%. The solution to the abuse of the 3% fee is for this Court to explain that its statement in Stone that "a reasonable fee should be

ascertained by considering the time spent, the nature of the service, and the skill and experience required" means ***a reasonable hourly rate.*** After all, purportedly the hourly rate an attorney charges for any legal service is a reflection of his years of practice, skill and experience

Aside from very small probates, which can be handled by the bar either at a discount as a public service, or in excess of 3% with perfunctory approval by the District Court on law and motion day, only on the rare occasion, such as in *Benson,* will an hourly fee exceed 3%.[11] Further, it certainly is appropriate, in a Stenson-type case, which involved the concurrent litigation of a wrongful death suit, to recognize that it is appropriate to permit a contingent fee on the portion of the probate that involves tort or contract claims traditionally handled on a contingent basis. Other than that, this Court should require the bar to charge for probate on an hourly basis.

Requiring an hourly rate will bring certainty to this area of confitsion. It may take years to undo the harmful perceptions of the public due to the 3% fee, but we must start somewhere. Only an hourly rate will protect estates, the public, and the reputation of the bar.

[11] At $125 per hours for 20 hours, i.e., a fee of $2,500, an estate must be less than $83,333 for the fee to exceed 3% of the estate.

D. The District Court erred, in a probate case regarding the reasonableness of fees, in denying discovery of the records of the personal representative and her attorneys.

Once this Court reverses the District Court's ruling on standing and the insurance issue, the discovery issues subject to the District Court's Order of October 30, 1998, and the previous interlocutory appeal, again come to the fore.[12] Therefore, it would be appropriate for this Court to consider said issues now, as opposed to having the heirs tile a second Application for Writ.[13]

Fundamentally, at issue is the applicability of Rule 26(b)(1) of the Rules of Civil Procedure to attorney fee hearings that interested parties are entitled to under the Uniform Probate Code and Rule 26(b)(1) of the Rules of Civil Procedure. The limitations placed upon the heirs in the case at bar are inappropriate. The equitable power of the District Court to determine probate fees (§72-3-634, MCA) does not permit the District Court the power to bar discovery, or to decide that relevant and material evidence will not be admissible. Unless there is a specific provision to the contrary, the Rules of Civil Procedure apply to any proceeding under the Uniform Probate Code, including challenges to fees. (See 872-l-104

[12] Since the District Court dismissed the underlying action in its 1 1/17/98 Order, it appears that the sanctions threatened in its 10/30/98 Order are moot. Van *Loan v. Van* Loan, 271 Mont. 176, 185,895 P.2d 614,619 (1995).

[13] The discovery requests are at Appendix 2 of the Application; they are summarized at p. 11 of said Application.

and §72-1-106, MCA) Therefore, the Rules of Civil Procedure, including Rule 26(b)(l), apply to these proceedings.

Further, §72-3-603, MCA, of the Uniform Probate Code provides that interested parties, including the heirs, are entitled to "information regarding the administration" of the estate. Thus, the heirs have a right to this information even absent the discovery permitted under Rule 26(b)(l) of the Rules of Civil Procedure.

During discovery, the heirs need not establish that every item of discovery the personal representative, her attorneys and her accountant is requested to produce will be admissible. The scope of discovery is very broad. As this **Court** stated in *Preston, v. The Montana Eighteenth Judicial District Court,* 282 Mont. 200; 936 P.2d 814; 1997 Mont. LEXIS 64; 54 Mont. St. Rep. 312 (1997)):

> As we stated above, discovery requests are to be construed broadly in favor of disclosing any information tending to lead to admissible evidence. Whether that evidence is admissible is for the court to decide at trial, not for [the party opposing discovery] to determine at the discovery stage of proceedings.
>
> 282 Mont., at 208.

This Court also has recognized that the purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit. Discovery fulfills that purpose by assuring mutual knowledge of all relevant facts gathered by both parties which are essential to proper litigation. *Massaro v. Dunham,* 184

Mont. 400, 405, 603 P.2d 249, 252 (1979) (Quoting *Hickman v. Taylor, 329* U.S. 495, 507, 67 S.Ct. 385, 392, 91 L.Ed. 451,460 (1947)).

The discovery sought in this case fulfills those purposes, particularly since the files of the personal representative and those of her attorneys are the chief evidence of whether their fees are reasonable. In discovery the heirs are entitled to at least explore this information to determine whether it will be admissible. *Stokus v. Philips,* 65 1 So.2d 1244 (Fla.App., 1995).

This Court should reverse the protective order, which effectively limits discovery to the affidavits supplied by the personal representative and her attorneys and any written information provided the attorney's expert witness. That is clear error. It is difficult to see how the ascertainment of truth is assisted by permitting only one party, here the personal representative and her attorneys, to make the determination as to what facts can be discovered and then presented to the District Court. In a fee case the underlying records of the personal representative and her attorneys are highly relevant and discoverable. As noted in a sister jurisdiction, under the Uniform Probate Code, when fees claimed are challenged there is nothing unreasonable to require that the attorneys submit some form of additional support, beyond mere textual statements of services performed, as evidence that fees are reasonable. *Matter of the Estate of Krueger, 438*

N.W.2d 898 (Mich.App., 1989). Further, the demonstrated unreliability of an attorney, from an examination of such records, may be used as grounds for reducing any fee claimed. *Matter of Estate of O'Neill, 425* N.W.2d 133 (Mich.App., 1988). Finally, as in the case at bar, the employment of multiple attorneys by an estate, which could result in duplicative work as records may indicate, is certainly an issue, and may result in disallowance of some attorney *fees. In re Sloan Estate,* 538 N.W.2d 47 (Mich.App. 1995).

As to the personal representative, what she has been doing with her time, as evidenced by the documents requested, is directly relevant to the reasonableness of the fees charged thereof. *In re Estate of Stone, 768* P.2d 334 (1989)

1. The Personal Representative and Her Attorneys Have Waived Privilege Through Disclosure

This District Court held that the records of the estate, including the personal representative's records, those of her attorneys, and their communications with each other and third parties were privileged under either the attorney-client privilege or the work product doctrine. [1 0/30/98 Order, *passim]* This is incorrect and reversible error since they have, by submitting their affidavits, made testimonial use of these records. Further, the heirs, as interested parties, are entitled to this information under the Uniform Probate Code. $72-3-603(2)(b)

The affidavits submitted by the personal representative and her attorneys (Appendix 4) were consciously and voluntarily produced by them. The documents contain otherwise privileged statements. These statements purportedly support that the time expended on this estate by both the personal representative and her attorneys was reasonable and for the benefit of the estate. This disclosure of a substantial portion of the communications between the personal representative and her attorneys, and between the attorneys and third parties, waives privilege as to all such communications. Rule 503, Montana Rules of Evidence, provides as follows:

> (a) General Rule. A person upon whom these rules confer a privilege against disclosure waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

Rule 503(a), Montana Rules of Evidence.

This Rule codifies the principal that "when the holder of a privilege ceases to treat the matter as privileged, the privilege terminates." Official Comments, MCA (Annotations), Rule 503 Official Comments. "It should be noted that Montana law requires an objection to testimony or that the privilege is waived." *Id.,* citing cases.

This Court has defined waiver as an "intentional or voluntary relinquishment of a known right or conduct which implies relinquishment of a known right." *State v. Statczar, 743* P.2d 606, 610 (1987). The test for determining whether a waiver of attorney-client privilege has occurred requires consideration of two elements (1) the element of implied intention; and (2) the element of fairness and consistency. *See Pacificorp v. Department of Revenue, 838* P.2d 914,919 (1992).

Implied waiver can be inferred from disclosure of privileged materials during discovery, despite the disclosing party's subsequent claim that waiver was not intended. The voluntary disclosure of a privileged communication waives the attorney-client privilege as to all other communications on the subject. See *Weil v. Investment Indicators, Research & Management, Inc., 647* F.2d 18, 24 (9th Cir., 1981); *Goldsborough v. Eagle Crest Partners,* 805 P.2d 723,726 (Or.App. 1991)

> Indeed, when, as here, the privileged communications is voluntarily disclosed without objection by the asserting party's counsel and in the absence of surprise or deception by opposing counsel, it may not be necessary to look beyond the objective fact of disclosure in ruling on the question of waiver.

Weil, 647 F.2d at 25, n. 13 (citations omitted)

Fairness also plays a role in determining whether privilege has been waived. The personal representative and her attorneys are not entitled to selectively

produce privileged documents, without waiving privilege in its entirety on the subject matters addressed in the documents. The U.S. District Court for Montana rejected precisely this same type of selective disclosure as presented in this case. *Northern Montana Hospital v. Continental Casualty* Co., 14 Mont. Fed, Repts. 245 (1993).

In the case at bar, the affidavits purportedly establish the time spent and services rendered by the personal representative and her attorneys and that said services benefited the estate. Client meetings, with date and topic are revealed. Correspondence with date and nature are revealed. Communications with third parties, including the estate's accountant and the Commissioner of Insurance are revealed. All this information was provided, voluntarily, and without the reservation of any privilege, and is, therefore, discoverable.

2. The Attornev Client Privilege Does Not Apply When a Party Has Placed the Communications "At Issue" in the Pending Lawsuit

A recognized exception to the attorney-client privilege is that the privilege may not apply when a party has placed the communications at issue in the litigation by a defense or affirmative claim. "[I]t is clear from our view of cases from other states that by placing in issue a confidential communication going directly to the claim or defense, a party impliedly waives the attorney client privilege with respect to that communication." *Mountain States Tel. & Tel. v.*

DiFede, 780 P.2d 533, 543 (Colo., 1989) In these cases, fairness dictates that the opposing party have access to communications that would otherwise be privileged.

In the case at bar, the personal representative and her attorneys have placed these communications at issue by stating that they represent a reasonable amount of time spent on the estate, at a reasonable rate, and were for the benefit of the estate as opposed to their personal benefit.

For example, the personal representative has related in attorney-client meetings in her affidavit, the general content of which are detailed in her attorneys', her agents, affidavits. Said disclosures by herself, and through her agents, constitute a waiver of her attorney-client privilege. *Kuiper v. District Court of the Eighth Judicial District,* 193 Mont. 452; 632 P.2d 694 (1981). In order to justify her fees, she claims that the time spent with her attorneys, for which she is ultimately charging to the heirs, was reasonable and for the benefit of the estate as opposed to her personal benefit. This is the kind of situation where the at-issue doctrine requires her to disclose the facts needed to confirm her alleged intent and the reasonableness of her fee.

Similarly, the specific content of attorney communications, both with the personal representative and third parties, bear directly upon the issue of the affirmative defense of said counsel that the time charged for such communications was reasonable and benefited the estate.

Finally, a personal representative is a fiduciary, who "shall observe the standards of care applicable to trustees under the laws of the state of Montana." (§72-3-610, MCA). Said duties imposed upon a personal representative under the trust code include the duty of loyalty, impartiality, and to avoid conflicts of interest (§72-31-103, §72-31-204, §72-31-195, MCA, respectively). And transactions involving the personal representative are voidable if there is a conflict of interest (§72-3-615, MCA). As such, privileges do not apply to prevent beneficiaries, the heirs, from discovering communications between a personal representative and her attorneys which are related to the administrations of the estate. See *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co., 543* F. Supp. 906,909 (1982).

In the case at bar, the conversion of the decedent's insurance proceeds by the Personal Representative, directly and by charging unsubstantiated fees, violate all of these fiduciary duties. At issue is whether the frivolous and false defenses asserted to justify this conversion are "consistent with the best interests of the estate", or serve merely to benefit the personal interests of the personal representative and estate counsel. *In re Estate of Stenson*, 243 Mont. 17, 792 P.2d 1119, at 1112 (1990) After all, the Ms. Miles has collected a $16,000 tax refund, a "personal benefit", by representing to the Department of Revenue that the

annuity contract is insurance, and wants to keep all of it in defiance of the terms of the Will. If so, defending her breach of trust should not be an expense of the estate. *Flikkema, et al.* v. *Kimm, 255* Mont. 34, at 42; 839 P.2d 1293 (1992)

In short, a personal representative cannot claim that the communications between her attorneys related to the administration of the estate are privileged. Nor can she pick and choose which communications she will disclose. Nor can she assert a defense based upon the records of the estate and not place those records at issue.

3. Work Product Privilege Does Not Apply to These Records and Third Party Communications.

The work product privilege is not applicable to this case since the reasonableness of the attorney fees themselves are at issue, and by producing affidavits regarding their activities as attorneys, they have waived any such privileges as to the documents or communications underlying said affidavits. As stated by this Court in *Palmer vs. Farmers Insurance Exchange,* 261 Mont. 91, 891 P.2d, at 912:

> With ordinary work product, once a witness makes testimonial use of the files, the witness implicitly waives the protections of the work-product doctrine with respect to factual matters covered in the testimony of the witness.

In the case at bar, the attorneys for the personal representative have made testimonial use of their records, by submitting their affidavits and, as such, have waived work product privilege.

For example, Mr. Brown's notes from which he derived the hours stated on his affidavit bear directly on the reasonableness of said hours. *Flikkema, et al. v. Kimm*, 255 Mont. 34, 839 P.2d 1293 (1992)). Hence, Mr. Brown's notes are discoverable.

4. Such Records Were Admitted In Prior Cases In Montana and Have Been Ruled Discoverable in at Least Three Other Uniform Probate Code Jurisdictions.

In the context of probate, in Montana such evidence has been submitted in at least three separate cases. *In re Estate of Stone, 768* P.2d 334 (1989); *In re Estate of Stenson,* 243 Mont. 17, 792 P.2d 1119 (1990); and *Flikkema, et al. v. Kimm*, 255 Mont. 34, 839 P.2d 1293 (1992)). Therefore, said evidence must have been deemed discoverable.

At least three other Uniform Probate Code jurisdictions have concluded that attorney files in a probate case are discoverable. *Matter of the Estate of O'Neill,* 425 N.W.2d 133 (Mich.App., 1988) (attorney demonstrated unreliability of his method of computing his time, given his failure to keep any ledger sheets and the fact that fifty-three entries in logbook kept by the personal representative, original time noted had been written over with higher numbers); *Stokus v. Philips,* 651

So.2d 1244 (Fla.App., 1995) (trial court compelled production of attorney's records); and *First Trust Co. of North Dakota v. Conway, 345* N.W.2d 838 (N.D., 1984) (attorney's business records received into evidence).[14]

Evidence of the activities of the personal representative has also been held discoverable in other Uniform Probate Code jurisdictions. For instance, the failure of a personal representative to present records of his services was held against him in connection with his fee request in Michigan. *Matter of Estate of Krueger,* 438 N.W.2d 898 (Mich.App., 1989) And the failure of a trial court in allowing a personal representative's claim for compensation without adequate evidence of the services performed and the value of said services was held an abuse of discretion. *Matter of Estate of Baird,* 357 N.W.2d 912 (Mich.App., 1984) And in determining what constitutes reasonable compensation for a personal representative, Colorado has held that the critical question is not how large an estate is (as claimed by opposing counsel) but rather what actual services were required and rendered. *Matter of Painter's Estate,* 567 P.2d 820 (Colo.App., 1977). Finally, Florida required the lower court to make specific findings as to

[14] Counsel for the heirs is, however, duty bound to state that there is one Pre-Stone case that provides that such evidence is not discoverable. *(Mutter of Magelssen 's Estate,* 182 Mont. 372, 597 P.2d 90 (1979)) The rationale of said decision, that the "3% fee" is a reasonable fee, was vitiated by *Stone*, and its successors, *Stenson,* and *Flikkema*, and is no longer controlling authority.

hourly rates and the number of hours reasonably required by the personal representative and the attorneys. *Moyle v. Moschell & Moschell, 583* So.2d 111 (Fla.App., 1991)

Therefore, this Court should permit discovery of this material.

The remaining matters shall be dealt with briefly.

At the hearing on the annuity issue, Douglas A. Holm testified that he was instructed by counsel for the personal representative to charge the maximum attorney fee based on statute and was supplied by said attorney with a copy of said statute. (9/2/98 Tr., p. 16) However, counsel for the personal representative now deny that they are charging the "maximum fee" since the personal representative fee charged is less than 2% of the gross *estate.* [See Response to Motion for Settlement of Fees, p. 2 (9/17/98)]

This directly contradicts the testimony of their own accountant. They even claim that the statutory fee is, *per se,* a reasonable fee. [See Response to Motion for Settlement of Fees, p. 1 (9/17/98)] They also state that *In re Estate of Stone* is "legally inapplicable to the present probate proceedings" and does not provide the legal standard for determining the reasonableness of probate fees in the state of Montana. [See Response to Motion for Settlement of Fees, pp. 2-3] Finally, testimony was proffered that even the fee stated in this case was subsequently

raised by said attorneys in excess of the "maximum" fee, without informing the District Court. [10/27/98 Tr., p. 9; Response To Application, Ex. B]

Thus, counsel for the personal representative put at issue how they calculate their fees.

In that context, the discovery request for prior inheritance tax returns filed under their guidance in the last five years are highly relevant as to whether Mr. Knuchel and the Fred Paoli firm are charging the "maximum fee." Were said forms to indicate consistently that these attorneys are charging estates 2% of the taxable estate for personal representative fees and 3% of the taxable estates for attorney fees, regardless of the complexity of any particular estate, said pattern would be highly relevant, material and probative as to the nature of the fees being charged to this estate. [*Id.*]

The District Court ruled that even if other Inheritance Tax Returns filed by opposing counsel demonstrated a pattern of percentage fees, regardless of the size or work performed for the estate, that said forms had no relevance to the fees charged this estate or to the credibility (for impeachment) of opposing counsel, or would tend to lead to discoverable evidence (such as prior estates or heirs that were charged said fees). [*Id.*] This ruling is completely in error, and contrary to Rule 26.

Similarly, prior disciplinary complaints filed against said attorneys, particularly any that might pertain to probate, is highly relevant, material and probative as to the reasonableness of the attorney fees charged in the case at bar. Further, since opposing counsel have placed their own credibility at issue, by misrepresenting fact to opposing counsel[15] and by misrepresenting law to the Court, and will be required by the heirs to testify at trial, prior acts of professional misconduct are probative and relevant as to their truthfulness, character and standing in the legal community, as well as calculated to lead to discoverable material.

The only legitimate concern is the privacy of the parties whose inheritance tax returns are to be discovered. (Attorney client privilege, or work product privilege certainly do not apply since these are public documents.) A secondary concern is the confidentiality of disciplinary records. However, this Court has given ample guidance on the evidentiary use of such records in *Human Rights Division v. City of Billings*, 199 Mont. 434; 649 P.2d 1283 (1982), privacy interests can be balanced against the heirs discovery right by a protective order. The record sought herein are certainly less intrusive than the non-party employment records ordered produced in that case. (Id)

[15] See Movants' Reply Brief, pp. 15-16 (9/23/98)

Mr. Paoli's "disappearance" in this case is discoverable. It was the Paoli "firm" that was retained by the estate, not Kevin S. Brown. Said firm had only one principal and only one associate during these events. It is the Paoli "firm" that is charging these fees, which will be ultimately paid for by the heirs. It is the efficiency and practices of the Paoli "firm" that are at issue. Further, it is Mr. Paoli's absence that appears to have resulted in the duplicative fees of Mr. Knuchel (who is not even a member of the Paoli "firm".) If the sole principal of the Paoli "firm" abandoned it to coach rugby at Harvard, or "loaned" it to Mr. Brown, and Mr. Brown has knowingly cooperated and abetted this breach of professional conduct, that bears directly upon not only Mr. Paoli's character and standing in the legal community, but *Mr.* Brown's as well.[16] *Chamberlin v. Puckett Construction,* 277 Mont. 198 205,921 P.2d 1237, 1241 (1996).

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[16] As this counsel argued before the District Court:

> Mr. Close: Sir, Mr. Paoli does not have the privilege of establishing a law firm and then walking away from it and letting his associate just run loose.
>
> The Court: You know --
>
> Mr. Close: And my, the costs incurred for him doing so are being borne by my clients out of their share of the insurance.
>
> The Court: I guess we'll find that out during the fee hearing, Mr. Close.
>
> 10/27/98, Tr., p. 20.

Apparently, the District Court ruled that questions regarding Mr. Paoli's lack of supervising an associate could be asked at the forthcoming hearing and were relevant --just not discoverable.

Any concern regarding the intrusiveness of said request, indicates not that these material are not discoverable, but should merely be redacted to avoid references to specific clients. There certainly is no need to redact an entry such as "9/29 playing at Yale." Further, it is difficult to conceive of how Mr. Paoli answering the question of "The date or dates which you were absent from Livingston, Montana, since June 10. 1997." affects any privileged information.

E. The District Court erred, as a matter of law, in refusing to sanction counsel for the personal representative for presenting a legal brief on the insurance issue that is not well grounded in fact and is unwarranted by existing law.

Based upon statements contained in the personal representative's September 2, 1998, "Hearing Brief", this counsel sought sanctions under Rule 11. The District Court refused to hear oral argument on this matter at the October 27, 1998, hearing [Tr., p. 17; Response to Application, Ex. B] and formally denied sanctions in its order of October 30, 1998. The heirs now appeal that denial.

To summarize the sanctionable statements in the Hearing Brief:

Statement of Law:

> "Unlike *Fligman*, the statutory definition of 'insurance producer' no longer includes sellers of annuity contracts." (Hearing Brief, p. 3)

Conclusion to Be Inferred: That an annuity contract is not an insurance product vended by insurance producers.

The Truth: In point of fact, only licensed insurance producers may sell annuities in the state of Montana. (See §33-17-102(9), §33-17-103, §33-7-525, and §33-17-201) Further, a complete reading of the statute indicates that an "insurance producer" includes vendors of annuities, just as in 1942. [See Petitioners' Reply Brief, pp. 8-10, (9/8/98)]

Therefore, the position stated is clearly is not warranted by existing law, misrepresents said existing law, and should be sanctioned under Rule 11.

Statement:

> "The regulation of life insurance is generally governed by M.C.A. section 33-20-200, et. seq. Under the headings of exceptions, 33-20-2 12 provides that:
>
> 'This part does not apply to:
> . . . d) an annuity or reversionary annuity contract."'

Conclusion drawn therefrom:

> "As such, the legislators have specifically exempted annuities from the code provisions pertaining to life insurance and insurance companies." (Hearing Brief, p. 3)

The Truth: Regarding the second false statement, the regulation of life insurance is ***not*** governed generally by §33-20-200, *et seq.* Title 30, Ch. 20, of the Insurance Code has thirteen parts, ***all*** of which deal with life insurance. In fact, §33-20-101 specifically states that "Except as provided in subsection (2), parts 1 through 5 of this chapter apply only to contracts for life insurance ***and annuities,*** other than reinsurance, group life insurance, and group annuities.""

[17] Subsection 2 is not even an exclusion, but adds that Sections 33-20-114 and 33-20-131 "also apply to group life insurance and group annuities."

(emphasis supplied) Therefore, under §33-20-101, chapter 20, which is concerned with the regulation of life insurance, applies, unless there are specific exceptions, to annuities.

Chapter 20, Part 2, cited by opposing counsel as exempting annuities from the Insurance Code provisions pertaining to life insurance and insurance companies, concerns not the complete regulation of life insurance contracts, but is merely the "Standard Nonforfeiture Law for Life Insurance". (§33-20-201) The Section referred to by opposing counsel excepts from this *part* (not the *entire title*, or even chapter, as stated by opposing counsel):

> (1) This part does not apply to:
> (a) reinsurance;
> (b) group insurance;
> (c) a pure endowment contract;
> (d) an annuity or reversionary annuity contract...
> (§33-20-201(1))

Obviously, reinsurance and group insurance are insurance. Further, the highly selective manner in which §33-20-201, MCA, is quoted in the Hearing Brief, and the conclusions derived therefrom, evidences a purposeful intent of counsel for the personal representative to mislead the District Court.

The reason annuities are not included in part 2 is not because they are excepted from the terms of Chapter 20, or, by implication, from Title 33, but because Ch. 20, part 5, provides for a "Standard Nonforfeiture Law for Deferred Annuities" that take into account the particularities of annuity contracts.

In fact, Part 3, Part 4, and Part 5 of Chapter 20, the chapter actually concerned with life insurance, are devoted ***exclusively*** to annuity contracts -- covering their regulation within the life insurance provisions of the Insurance Code. (See §33-20-101, MCA)

Therefore, the sweeping statement of opposing counsel that annuity contracts are not governed by the Insurance Code, or the chapter of the Code that pertains to life insurance, is clearly not warranted by existing law.

The District Court, while denying sanctions, made the following two rulings: (1) "only a life insurance producer may sell annuities" and (2) "that annuities are governed Title 33 of the Montana Code." These are precisely the misrepresentations of law for which sanctions are herein sought. Therefore, based upon the findings of the District Court the statements of opposing counsel in his "Hearing Brief', were not well grounded in fact and are unwarranted by existing law. As such, sanctions should be imposed under Rule 11.

CONCLUSION

It has been almost ten years since the Montana Supreme Court issued its decision in *In re Estate of Stone.* One would have thought that this shot across the bow would convince estate practitioners that they could no longer charge the "statutory fee" as a per se "reasonable" fee (as claimed by opposing counsel) to estates, but should charge based upon the "time spent, the nature of the service, and the skill and experience required." Instead, the practice continues, and is certainly alive and well in Livingston as indicate by the filings of opposing counsel and the comments from the bench. In the last year counsel for the heirs

has had, at public seminars, at least three members of the public relate to him experiences of a relative's estate being charged the "statutory fee" -- including one where the attorney involved had shown her the statute to justify said fee (as appears to have happened in this case, as well; counsel for the heirs has proposed to the State Bar legislation incorporating the language of Stone into the pertinent probate provisions to prevent further such occurrences.) Further, the 3% fee continues to be used by trust mills to scare the public, justifiably it appears, into buying living trusts. Counsel for the heirs also learned, at the recent tax institute in Missoula, from an IRS auditor that not only are the average probate fees in Montana significantly higher than in Colorado and Wyoming, but that almost one-third of said returns charge a straight 3% for attorney fees -- including returns with nothing but liquid assets, such as securities.

Counsel for the heirs charges on an hourly rate to do a probate, based upon his skill and experience. In contrast, in the case at bar, Mr. Brown, unsupervised by the principal of his firm is conducting his first probate at a rate of $262 per hour.

This Court must put a stop once and for all to the practice by certain members of the bar of using the provisions of the Uniform Probate Code, that were

designed to simplify fees and protect clients (in response to abuses in Butte), as a vehicle to exploit the real client: the estate that they are supposed to be protecting.

This Court should also make clear that the distinction between procedural law and substantive law that applies in every other area of law applies to attorney fee cases as well. There is not a single other area of civil law where a District Court would even conceive of permitting a defendant in a civil action to determine what evidence is discoverable or admissible at trial. The Rules of Civil Procedure, including Rule 26(b)(l), apply to attorney fee cases.

Therefore, the order barring discovery in this case should be reversed and the District Court should be ordered to grant a reasonable period for counsel for the heirs to complete discovery and prepare their case. And this Court should, finally, make clear to the bar that probates must be charged not upon a "statutory basis" but only upon on a reasonable hourly rate.

Respectfully Submitted,

Brian F. Close, Attorney for the Heirs

CERTIFICATION OF COMPLIANCE

Said Brief is hereby certified to be doubled space proportional 14 pt. type (New Times Roman), and a total word count of 12,242,

BY: _____
Brian F. Close

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of February, 1998, a true and correct copy of the foregoing **APPELLANTS' BRIEF** was served, by U.S. Mail, postage prepaid, upon counsel of record at the following address:

Karl Knuchel
Attorney at Law
116 West Callendar
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Kevin Brown c/o
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Attorneys at Law
120 West Callendar
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B Y : _____
Brian F. Close

APPENDIX

DISTRICT COURT ORDER DATED 10/30/98

DISTRICT COURT ORDER DATED 11/17/98

Filed this 30th day of Oct A. D. 1998
at 2:51 o'clock P M
JUNE LITTLE
Clerk of District Court
Park County, Montana
By Paula Brewer
Deputy

HON. Wm NELS SWANDAL
District Judge
Sixth Judicial District
414 East Callender
POB 437
Livingston, Montana 59047
(406) 222-4 132

MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

IN THE MATTER OF THE ESTATE OF:
CHARLES LAUREN MILES,
Deceased.

Probate No. DP 97-23

ORDER

A hearing on the estate's and personal representative's motion for protective order and sanctions, and the heirs motion for sanctions came for hearing on October 27, 1998. The personal representative was personally present and represented by Karl Knuchel and Kevin Brown, and the heirs were represented by Brian Close. The Court had previously read the briefs of counsel and t-viewed the file. At hearing the Court heard arguments presented by counsel and now makes the following order:

IT IS HEREBY ORDERED AS FOLLOWS:

1) That the heir's motion for sanctions is DENIED.

2) That the Court issues the following rulings on the personal representative's motion for protective order concerning the heirs first set of discovery requests:

i) Requests for production No. 1 & 2 shall be answered by the estate by November 9, 1998; ✓

ii) The motion for protective order as to quest for production No. 3 is GRANTED and no discovery will be had. This request for production is vague and could conceivably cover all documents in counsel's file, privileged or not.

iii) The motion for protective order is PARTIALLY GRANTED as to request for production No. 4. The personal representative shall deliver to counsel for the heirs, by November

13, 1998, copies of any documents she is going to rely on in establishing the fee she believe-s is reasonable in this matter.

iv) The motion for protective order is PARTIALLY GRANTED as to quest for production No. 5. Counsel for the estate and personal representative shall deliver to counsel for the heirs copies of all documents which will be used by them or their expert witness in establishing the reasonableness of their fee.

v) The motion for protective order is GRANTED as to requests for production Nos. 6-9, except as provided by rulings (2) (iii) & (iv) above. These requests are overbroad and would violate the attorney-client privilege.

vi) The motion for protective order as to quests for production Nos 10 & 11 are GRANTED, except as provided by rulings (2)(iii) & (iv) above.

vii) The motion for protective order as to interrogatory No. 1 is PARTIALLY GRANTED. Mr. Brown will, if he recorded the name of the person he conferred with at the Insurance Commission Office, give that name to counsel for the heirs by November 9, 1998. Counsel for the heirs indicated during the hearing that he has had free access to Mr. Holms and he can certainly talk to and subpoena the others if he chooses to do so.

viii) The motion for protective order as to request for production No. 12 is GRANTED, except as provided in rulings (2)(iii) & (iv) above.

ix) The motion for protective order is GRANTED as to interrogatory No. 2, quest for production No. 13, interrogatory No. 3, request for production No. 14, interrogatory No. 4, and request for production No. 15 and no discovery shall be had.

3) That the Court will issue sanctions against counsel for the heirs as to ruling (2)(ix). The Court finds that these discovery requests were not designed to elicit any relevant information, but designed to harass, and embarrass opposing counsel and needlessly increase the costs of this litigation. The amount of sanctions will be addressed at the November 25, 1998 hearing.

4) The Court hereby admonishes counsel for the heirs that any further briefs or other documents filed with this Court shall meet at least minimal levels of professionalism and civility and will avoid personal attacks on opposing counsel or the personal representative. Any violation

of this order will result in sanctions.

5) That counsel for the estate and personal representative will disclose to counsel for the heirs the name of any expert they intend to call at the November 25, 1998 hearing by November 6, 1998, and counsel for the heirs will disclose to counsel for the estate and personal representative any expert he intends to call at the November 25, 1998 hearing by November 16, 1998.

5) The Court will tile an explanatory comment when time permits.

DATED this 30th day of October, 1998.

Wm. NELS SWANDAL, District Judge

cc: Kevin Brown
Karl Knuchel
Brian Close

HON. Wm NELS SWANDAL
District Judge
Sixth Judicial District
414 Fast Callender
POB 437
Livingston, Montana 59047
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MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

IN THE MATTER OF THE ESTATE OF: CHARLES LAUREN MILES, Deceased.	Probate No. DP 97-23 ORDER RULING ON MOTIONS FOR ACCOUNTING AND SETTLEMENT OF FEES

FACTS:

Charles Lauren Miles died on June 10, 1997. At the time of his death, he lived in Gardiner, Montana.

Mr. Miles executed his last will and testament on May 27, 1982, and in that will nominated his ex-wife, Patsy Joan Miles as personal representative. The will was admitted to probate and Patsy Miles was appointed personal representative on July 14, 1997. The personal representative was represented by Livingston attorneys Kevin Brown and Karl Knuchel.

Pursuant to lhe will, Patsy Miles received 50% of the balance of any insurance proceeds payable upon the death of Charles Miles, and his four children received the other 50%. Patsy Miles was also named as devisee for the remainder of the estate.

Patsy Miles disclaimed her interest in personal property belonging to Mr. Miles and in his Resources Trust IRA worth $120,000.00. Under the terms of the will, (effective solely due to Patsy Miles' disclaimer), the personal property and IRA were then divided between his four children. The total value of the disclaimed property was approximately $144,955.00

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On March 10, 1981, Mr. Miles purchased a $20,000 term life insurance policy through the Veteran's Group Insurance Trust. On June 6, 1981, he added an additional $4,000.00 of term life insurance coverage to the policy. Both policies were in effect when he drafted his May 27, 1982 will, but had lapsed at the time of his death. Mr. Miles paid $30,000.00 for an annuity contract issued by Hartford Life Insurance on May 27, 1994. At the time of his death, the annuity contract was worth in excess of $52,000.00

Counsel for some of the children filed a petition for accounting on August 4, 1998. The petition alleged that the annuity contract should be considered as insurance proceeds and that the children were thus entitled to 50% of the balance remaining after payment of the expenses of administering the estate. The petition also alleged that the personal representative had wrongfully "converted" those proceeds to her own use even though the estate had yet to be closed.

A hearing was held on the petition on September 2, 1998. During the hearing counsel for the children did not call any witnesses in support of his petition. Counsel for the personal representative called two witnesses. One of the witnesses, Larry Eaglin, has been in the insurance business for about 35 years. He testified to the differences between life insurance policies and annuities.

Counsel for the children has also requested a hearing regarding the fees charged by counsel for the estate and the personal representative. This hearing has been set.

DISCUSSION:

1. Motion for Accounting

The question of whether the annuity contract should be considered insurance proceeds under the will is a difficult question. The only factual evidence presented during the hearing was from Larry Eaglin. He testified that an annuity is essentially an investment vehicle to store or hold money, and that Mr. Miles' annuity was a (ax-deferred annuity. According to Mr. Eaglin, life insurance is a contract between the parties subject to medical requirements. Life insurance

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FRAME NO 201

involves a substantial risk to the insurance company, unlike an annuity, which involves little or no risk.

It is the Court's understanding that annuities are generally used by investors to accumulate money for retirement, with taxes deferred until the money is withdrawn. Many arc designed to protect investors from outliving their savings. Of course, there arc many different types of pay-outs and uses of annuities. Life insurance, on the other hand, is generally a financial hedge against dying too soon and is used to protect family members or others.

Counsel for the children argues that this case is controlled by the case of In re Fligman's Estate, 129 P.2d 627, 113, Mont. 505 (1942). In Flieman's Estate, the Court held that the particular annuity contracts involved in that case were insurance for inheritance tax purposes, and were entitled to the $50,000.00 exemption. A July 30, 1998 letter from the Montana Department of Revenue establishes that the State of Montana considers commercial annuities as life insurance for inheritance tax purposes. Counsel for the children then makes the argument that since commercial annuities are considered annuities for inheritance tax purposes, that they have Lo be considered insurance for all purposes.

Counsel for the children also argues that annuity contracts are not investments because they are specifically excluded from the definition of investments under §30-8- 113(2), M.C.A. The Court finds this argument disingenuous, at best. 530-8-l 13 M.C.A. states that an annuity contract issued by an insurance company is not to be considered an "investment company security". It is certainly a stretch to argue that annuities are not investments because they are not "investment company securities". The annuity in this case grew from $30,000.00 to over $53,000.00 in a short time. The annuity in question is clearly an investment vehicle provided by an insurance company. Further, the annuity contract in the file contains the language "Putnam Investments", and notes that the tax-deferred annuity purchased by Mr. Mites is an "investment."

The Court agrees with counsel for the children that only a licensed life insurance producer may sell annuities, (§33-17-201, M.C.A.), and that annuities are governed by Title 33 of the Montana Code Does that mean annuities are insurance as counsel claims? Statutes specifically

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define the types of insurance coverage covered by Title 33, Chapter 1, Part 2, M.C.A. That list includes: casualty insurance, disability insurance, life insurance, marine protection, property insurance, surety insurance and title insurance. Annuities, in general, are not defined as insurance. It would have been easy for the legislature to include a definition of annuity as insurance if it intended that all annuities were to be treated as insurance. It did not do so. While counsel argues that 833-l-205 M.C.A. could be mad to include annuities, it appears to the Court that 533-l-205, M.C.A. states only that some types of insurance listed above may fit more than one definition within the code. The statute does not state, nor even suggest that annuities are insurance. Title 33, chapter 20 M.C.A. deals specifically with life insurance. §33-20-101 M.C.A. outlines the scope of chapter 20 and states that it applies to annuities as well as to life insurance. However, a reading of the entirety of Title 33, Chapter 20, M.C.A. reveals that parts which apply to annuities are separated and delineated from parts which apply to life insurance. For instance, §33-20-1 15 discusses beneficiaries in an industrial life insurance policy It cannot legitimately be said that all parts of Title 33 or even Chapter 20 apply equally to annuities as to life insurance. Kad the legislature wished for annuities and life insurance to be treated exactly the same, it would have so stated.

While an argument may be made that Mr. Miles purchased the annuity as a replacement for his previously lapsed life insurance policy, the evidence does not support that. On the face of the contract Mr. Miles. and the agent for the company, indicate that the annuity was not purchased to replace an annuity or life insurance policy. The Court cannot look into the mind of the deceased, but must stay within the four corners of the annuity contract and Montana Law. Mr. Miles clearly did not intend that the annuity replace his previous life insurance policy.

While annuities are considered insurance for inheritance tax purposes, it does not appear to the Court that pay-off of an annuity contract can be considered as "insurance proceeds payable upon my death" under paragraph V of Mr. Miles will or Montana law.

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2. Motion for Settlement of Fees

The Court, having determined that the annuity contract is not to be considered as insurance proceeds, fmds that the children of Mr. Miles have no interest in this estate. The will clearly leaves all remaining property to the personal representative, Patsy Miles. Therefore, the children have no standing to challenge the probate of this will. §72-3-634 M.C.A. gives any "interested person" the right to file a motion for review of employment of agents and compensation of personal representatives and employees. §72-1-103(25) M.C.A. defines "Interested persons" to include any "heirs, devisees, children, spouses,. . . . having a property right in or claim against . . . the estate of a decedent." The children of Mr. Miles, no longer having any property right in or claim against the estate, are no longer "interested persons" under Montana Law, and therefore have no standing to challenge the probate of the will.

Based on the above, the Court issues the following orders:

1 The Motion for settlement of fees is DISMISSED and the hearing set for November 25, 1998 is vacated.

2. The motion for accounting is DENIED and the annuity contract in this case shall not be treated as insurance proceeds, but merely as other assets of the estate.

DATED this 17th day of November. 1998.

Wm. NELS SWANDAL, District Judge

mld 11-19-98

cc: Kevin Brown
Karl Knuchel
Brian Close

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